Cause No. 13-19-00486-CV

IN THE THIRTEENTH COURT OF APPEALS OF TEXAS
CORPUS CHRISTI-EDINBURG

MSW CORPUS CHRISTI LANDFILL, LTD.
Appellant/Cross Appellee

VS.

GULLEY-HURST L.L.C.
Appellee/Cross-Appellant

APPEAL FROM THE DISTRICT COURT, 117th JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

GULLEY-HURST L.L.C.'S CROSS-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY

The briefs filed in this appeal by MSW Corpus Christi Landfill, Ltd. ("MSW") are rife with assertions that the jury made numerous liability findings against Gulley-Hurst L.L.C. (Gulley-Hurst"). In reality, only one finding of liability in favor of MSW was made which was in Question 1 "Did Gulley-Hurst fail to arrange for the refinancing of the AmeriState Bank Loan as required by the MSA?" Gulley-Hurst had numerous reasons why its attempts to arrange for the refinancing were not successful due to actions of MSW, but those were not accepted. Such is the nature of jury trials.

Contrary to those repeated assertions by MSW in its briefs, however, the jury did not find that MSW's delivery of a deed somehow was not a conveyance and it retained title to its half-interest in the Landfill. The jury did not find that MSW did not execute and deliver the deed. The jury did not find that Gulley-Hurst in some way "failed to close" the transaction or that the MSA was an option contract. The sole finding was the failure to arrange for the required loan refinancing on time.

As Professor Laycock noted in Gulley-Hurst's Response Brief as Appellee, the basic rule of remedies is for actual damages to be measured in a manner *"to put the plaintiff in the same economic position he would have been in had the contract ... been actually performed.*" *Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d 407, 419 (Tex. 2011) (citing numerous authorities); and *Kempner Water*

Supply Corp. v. City of Lampasas, 2019 Tex. App. LEXIS 615, 2019 WL 386136, *8 (Tex. App.–Corpus Christi 2019, no pet.). The corollary to that rule also is true that damages awarded should not make a contract plaintiff *better off* than if the contact had been performed. *Powell Elec. Sys. Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 127 (Tex. App.–Houston [1st Dist.] 2011, no pet.).

The only issues on this appeal pertain to what would be the actual damages suffered as the proximate result of Gulley-Hurst's failure to complete arrangements for the required refinancing on time. Typical damages questions could have included:

- *What amounts of principal or interest was MSW required to pay on the AmeriState loan due to Gulley-Hurst's default?* Certainly, if MSW had to make any payments, such would be actual damages, but no evidence was admitted of that.

- *What damages were suffered by MSW due to any default on the AmeriState loan by Gulley-Hurst?* No evidence of any loan default affecting MSW appears in the record.

In reality, no direct losses were suffered by MSW as a result of the failure to arrange for the refinancing on a timely basis. And in response to the damages issue for the related Question 4 for the individual guarantors about Gulley-Hurst's failure to arrange for the release of personal guaranties, the jury returned a verdict of $0.

The individual guarantors could not provide any evidence that they had to pay higher interest rates, they were denied credit, or they suffered any other losses as a result.

The primary Issue presented in Gulley-Hurst's appeal is whether there is no evidence, or legally insufficient evidence, to support the jury's answer to Question 3(2) on lost opportunity cost. Jury Question 3, part 2, was stated as follows:

> 2. MSW's lost opportunity cost of not having use of the money that was a natural, probable, and foreseeable consequence of Gulley-Hurst's failure to refinance the AmeriState Bank Loan. CR V2, P.3164.

Gulley-Hurst additionally questions whether the jury's answer to Question 3(2) on lost opportunity cost is factually insufficient, being weak and contrary to the overwhelming weight of all the other evidence.

The fundamental damages issue is what position would MSW be in had the contract been performed? Would it have $4,600,000 in cash to invest? No, it only would not be obligated on a debt of $4,600,000 to AmeriState Bank.

Would MSW have any right to borrow another $4,600,000 from AmeriState Bank? MSW's representatives asserted that AmeriState Bank was "their bank" and Gulley-Hurst damaged them by keeping the loan on the books at AmeriState Bank, but nothing in the MSA required Gulley-Hurst to refinance the loan at a different lender. RR V17, P.94.

MSW's expert witness assumed that once the loan was paid MSW would be able to borrow $4,600,000 again to invest. The record reflects that in December

2014, the two principals of MSW, Tom Noons and Shane Shoulders, created a new entity to acquire a Landfill in McKinney, Texas (the "McKinney Landfill") and took out a loan for $4,700,000 from a different lender at 6% interest for the purchase. RR V17, P.43. The principals of MSW testified that their preference would have been to procure a loan through MSW, but the AmeriState Bank loan prevented that. RR V16, P.137.

At this point, however, MSW's expert strays from the other facts. Instead of determining what the damages would be for MSW's "lost opportunity" in investing in the McKinney Landfill, as all of the MSW witnesses testified they wanted to do, he assumed that they would make some other unknown investment that would generate a return or profit equal to the interest rate that they would have to pay the bank plus the yield on US Treasury securities. RR V19, P.51-55.

At no time did any of MSW's witnesses ever testify that they wanted to invest in US Treasury securities or in some unknown investment that would generate a return equal to 7% to 10%. That would be the rate of return required to pay the interest on the new $4,600,000 loan and net a profit of 2% to 3% equivalent to US Treasury securities. (*see* PX-219, p.5 [offer of proof] at RR V26, P.292.).[1]

And what was the evidence submitted by the MSW investors on the return

[1] MSW references its expert report and table submitted as an offer of proof but never admitted into evidence. Although MSW has not appealed that ruling, the table represents a summary of the expert's testimony and is referenced here for illustrative purposes.

obtained on their McKinney Landfill that they developed in 2017? None. At the time of trial, they did not even confirm that the McKinney Landfill had opened.

Assuming that the principals of MSW could have not only borrowed the $4,700,000 in December, 2014, to purchase the McKinney Landfill but also borrowed another $4,600,000 in January, 2016, to develop the McKinney Landfill, how much of a return or profit would that $4,600,000 loan have generated for them? After all, that is what they testified they would do if MSW could have borrowed an additional $4,600,000. MSW's expert testified that during the first three years of operations of the Gulley-Hurst Landfill, it was not able to generate a return at all taking into consideration debt service on a $5,000,000 loan. RR V19, P65 and PX-219, Table C [offer of proof], RR V26, P.298. No evidence whatsoever was offered as to how much of a return the McKinney Landfill could have generated above its $4,700,000 purchase loan and any additional funds required to develop it.

MSW's expert testimony on "lost opportunity" costs violates a fundamental rule of damages. It would place the plaintiff in a much better position that it would have had if the contract had been timely performed. The expert's hypothetical investment has no relation to what MSW would have done with its new loan, and damages must be a "natural, probable, and foreseeable consequence" of the failure to refinance. CR V2, P.3164.

ARGUMENT

1. Whether there is no evidence, or legally insufficient evidence, to support the jury's answer to Question 3(2) on lost opportunity cost.

Damages cases specifically on "lost opportunity cost" are few. Both parties note the case of *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, 402 S.W.3d 257 (Tex. App. – Dallas 2013, pet. denied), which provides the standard for determining whether there is enough evidence to support a jury award of lost opportunity damages. In that case, the expert's opinions were based on the actual experiences of the plaintiff and other similar enterprises in the plaintiff's business as a real estate investment trust and determined the profits that would have been generated from those investments. *Id.* at 268. The appellate court concluded that it had enough evidence to support the jury's findings because the expert's damage model "was based in part on [the plaintiff's] own actual experience doing business over the course of the relevant time period…" *Id.* By calculating the returns on the investments that would have been made by the plaintiff using the plaintiff's own experience as well as similar market experiences, the plaintiff in *Basic Capital* could affirmatively show what would be "the natural, probable, and foreseeable consequence" of the lost use of funds as required by the damages question.

In contrast, MSW cites cases noting that "interest is an element of damages suffered by the 'loss of use' of money" as in *Tenn. Gas Pipeline Co. v. Technip USA Corp.*, 2008 Tex. App. LEXIS 6419, * 26 (Tex. App. – Houston [1st Dist.] 2008,

pet. denied). That case involves actual cash that the plaintiff invested in a project. Although liability for consequential damages was barred by provisions of the contract at issue, the court noted that interest earned by investing the funds elsewhere would have been a measure of the indirect losses. *Id.* The present case involves a lost opportunity to *borrow* funds, so measuring the loss by interest simply would be offset by the interest required to be paid on the loan.

Similarly, in *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918 (Tex. 1981) cited by MSW, the issue involved a bank's freezing the plaintiff's bank account, denying it access to working capital. Again, the issue was cash owned by the plaintiff and not simply a right to borrow money. *Id.* at 921-22. No cases can be found awarding damages based on lost interest earnings when the plaintiff would have to *pay* interest on borrowed funds to make the investment.

MSW's claim pertains to borrowing $4,600,000 and the lost opportunity from use of that investment. Any measurement of that loss must take into consideration the total return on the investment over the borrowing cost in paying interest on the loan. MSW's own expert conceded that point in his analysis that the return would have to be 7% to nearly 10% to generate a return or profit in excess of the borrowing costs of 4.75% to 7% per year. MSW claims that cases concerning lost "profits" are irrelevant, but Merriam-Webster's definition of "profit" simply is "a valuable return" or "the excess of returns over expenditures." Since MSW must reinvest its

$4,600,000 in something that would generate a greater return than its interest costs, it must make a profit. That profit must be a "natural, probable, and foreseeable consequence" of the default, so cases concerning lost profits are very relevant to this issue.

The court of appeals in *Basic Capital* cited the Texas Supreme Court's standard in *Holt Atherton Indus., Inc. v. Heine,* 835 S.W.2d 80 (Tex. 1992) on on lost profits as a guide. The Supreme Court noted that the amount of the loss must be shown by competent evidence "with reasonable certainty" and reversed the finding of damages for the plaintiff because it could not point out specific contracts that would be lost. *Id*. at 84. See also, *Shell Oil Prods. Co. v. Main St. Ventures*, 90 S.W.3d 375, 385 (Tex. App.—Dallas 2002, pet dism'd by agr.).

The standard of review for a no evidence or legally insufficient evidence appeal is set forth in *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). The record must disclose one of the following: (1) a complete absence of evidence of a vital fact; (2) the trial court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is not more than a scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Id.* at 810. MSW's expert provided no evidence whatsoever as to the vital fact of what MSW's returns would have been with the $4,600,000 in borrowed funds invested in the McKinney Landfill or some

similar landfill as its representatives stated they intended to do. Scouring the record for any other evidence of what such an investment could yield showed that the McKinney Landfill itself was not even open at the time of trial, and the Gulley-Hurst Landfill had not generated any kind of positive investment return over interest costs during a similar period.

The record provides no evidence, much less a scintilla of evidence, as to the vital fact of what would be the "natural, probable, and foreseeable consequence" of Gulley-Hurst's failure to refinance the AmeriState loan on a timely basis. The problem associated with MSW's expert testimony is not an issue under Tex. Rule Ev. 702. He clearly was expert in his field and knew how to calculate rates of return and profits over costs. The problem is that his hypothetical investment bears no relationship with the planned investment by the plaintiff or the typical returns from landfill operations which was plaintiff's business. He provided no evidence to support MSW's "lost opportunity" damages claim.

2. Whether the jury's answer to Question 3(2) on lost opportunity cost is factually insufficient, being weak and contrary to the overwhelming weight of all the evidence.

MSW could not even respond to the authority of *Fleming Mfg. Co. v. Capitol Brick, Inc.*, 734 S.W.2d 405 (Tex. App.—Austin 1987), concerning factually insufficient evidence for damages such as these. The court of appeals reversed and remanded the case to require the plaintiff to prove, at a minimum, what products

would have been produced, how they would have been sold, and what were the market conditions in order to support the plaintiff's claim. *Id.* at 407.

In *Fleming*, the only evidence the company offered concerned anticipated or potential production by a manufacturer and seller of bricks. *Id.* at 408. Even less persuasive, the only evidence presented by MSW concerned anticipated or potential profits based on a hypothetical investment, rather than the McKinney Landfill or some other typical landfill. The expert evidence submitted by MSW is weak and contrary to the overwhelming evidence provided by the principals of MSW stating that they would invest the funds in the McKinney Landfill which produced a zero return as of the trial date.

Accordingly, the evidence also is factually insufficient to support a verdict for damages from "lost opportunity cost" because the expert evidence is against the great weight of MSW's other testimony. MSW's evidence is based on theoretically potential returns from an unidentified investment which is not reasonably certain. While Gulley-Hurst maintains that this matter should be reversed and rendered based on the no evidence or legally insufficient evidence standard, if the Court of Appeals finds that the evidence only is factually insufficient, the new trial should address only the issue of "lost opportunity" damages.

PRAYER

WHEREFORE, premises considered, in summation of all of the appeals and cross-appeals in this case, Appellee and Cross-Appellant, Gulley-Hurst, requests that this Court of Appeals hold that:

1. The trial court properly granted summary judgment on MSW's various claims submitted in Counts1 through 13, inclusive of its fraud claims;
2. The trial court properly denied MSW the remedy of rescission of the MSA due to the absence of any mistake or fraud and MSW's retention and enjoyment of the other benefits of the MSA; and
3. There is no evidence, or legally insufficient evidence, to support the jury's answer to Question 3(2) on lost opportunity cost, or
4. Alternatively, the jury's answer to Question 3(2) on lost opportunity cost is factually insufficient, being weak and contrary to the overwhelming weight of all the evidence.

If the Court of Appeals concurs in items 1, 2 and 3 of the Prayer above, the trial court's judgment should be affirmed on all Issues raised by MSW and reversed and rendered as to Gulley-Hurst's Issue No. 1 on legal insufficiency, and Gulley-Hurst should be awarded its attorney's fees stipulated in the trial court. If the Court of Appeals concurs instead on item 4 of the Prayer above, the reversal and remand only should apply to the disputed fact issue of what were MSW's damages due to the

failure to refinance. Gulley-Hurst also requests such other and further relief to which it may be entitled.

Respectfully submitted,

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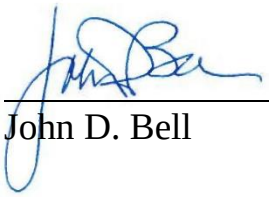
Pursuant to Tex. R. App. P. 9.4(i)(3), counsel for Cross-Appellant certifies that they relied on a word count computer program in preparing this document, that the font size is 14pt, and that this Cross-Appellant's Reply Brief and its original Cross-Appellant's Brief comply with Tex. R. App. P. 9.4(i)(2)(B). Excluding the items noted in Tex. R. App. P. 9.4(i)(1), this Reply Brief contains 2,738 words according to the word count of Microsoft Word program from the Statement of Facts through the end of the Prayer. When added to the word count of the Cross-Appellant's Brief and it's Appellee's Response Brief, the documents provides a grant total of 18,195 words.



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I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Appellate and Civil Procedure, on those named below, on this 15th day of January, 2021.

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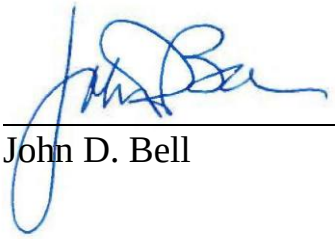

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